UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MASSACHUSETTS BAY INSURANCE COMPANY, Plaintiff, v. MALONEY & CURCIO, INC., Defendant.	Civil Action No.: **COMPLAINT FOR DECLARATORY JUDGMENT**

Plaintiffs Massachusetts Bay Insurance Company (hereinafter, "Massachusetts Bay"), with a principal place of business at 440 Lincoln Street, Worcester, Massachusetts, by and through its attorneys, Carroll, McNulty & Kull LLC, and by way of a Complaint for Declaratory Judgment against Maloney & Curcio, Inc. ("Maloney" or "Defendant"), located at 1601 Pennsylvania Avenue, Linden, New Jersey, states as follows:

INTRODUCTION

1. This is a Complaint for declaratory judgment in which Massachusetts Bay seeks a determination concerning the nature and scope of its obligations to Maloney, if any, in connection with an underlying lawsuit.

2. Specifically, Massachusetts Bay seeks a declaration that it is not obligated to defend or indemnify Maloney in connection with the underlying action, described in detail below, because the allegations included therein do not trigger coverage under the relevant policies issued by Massachusetts Bay.

PARTIES AND JURISDICTION

3. Plaintiff Massachusetts Bay is a Massachusetts company and is authorized to do business in the State of New Jersey.

4. Upon information and belief, Defendant Maloney is a New Jersey company and has a principal place of business at 1601 Pennsylvania Avenue, Linden, New Jersey 07036.

5. The amount in controversy in this dispute exceeds $75,000.

6. This Court has jurisdiction of the subject matter and the parties under 28 U.S.C. § 1332.

7. Venue is proper in this Court under 28 U.S.C. §1391.

FACTUAL BACKGROUND

A. THE UNDERLYING LOSS

8. This matter arises from the construction and subsequent renovation of a house located at 237 Oceana Drive in Loveladies, Long Beach Township, New Jersey (the "Property").

9. The complaint in the underling action maintains that the initial construction took place between 2004 and 2005, but that it was not sold until March of 2007 to Steve Schutz and Lynne Andreades (collectively, "Schutz").

10. Upon information and belief, Bayview Homes, LLC ("Bayview") built the Property and owned it until its sale to Schutz.

11. The underlying complaint asserts that, prior to purchasing the Property, Schutz retained a home inspector in February of 2007 to prepare a home inspection report. That report purportedly identified certain domestic water pipes located in an unheated crawlspace beneath the house that were not sufficiently protected from freezing.

12. According to the underlying complaint, Bayview allegedly addressed the lack of freeze protection for these pipes by adding "heat trace" to a short section of piping. Although the home inspector advised that this effort was not sufficient, Schutz maintains that Bayview ensured that the pipes were adequately protected. As a result, Schutz proceeded with the purchase.

13. Upon information and belief, in 2011, Schutz retained a company called Tradewinds Builders, LLC ("Tradewinds") to renovate the laundry room at the Property, which allegedly included the installation of "on demand" water heaters.

14. Upon information and belief, Tradewinds retained Shoreline Plumbing and Heating ("Shoreline") as the plumbing subcontractor for this project. Navien, Inc. ("Navien") was the manufacturer of the two water heaters that were installed, and Maloney was the manufacturer's representative, that assisted in the troubleshooting of issues with the water heaters.

15. Upon information and belief, Maloney addressed several issues relating to the water heaters between September 2011 and May 2012.

16. The underlying action further states that, in mid-January of 2015, Schutz left the Property for an extended trip and allegedly left the house thermostat at 60 degrees Fahrenheit. During that period, a pipe in a first-floor closet purportedly split, causing water to flow into the house. That water, however, allegedly was not discovered until April of 2015 when Schutz noticed an elevated gas bill and asked the gas company to check the Property.

17. Schutz maintains that, because the leaked water was hot (purportedly over 120 degrees), there was extensive mold and water damage throughout the home, rendering it a total loss that had to be demolished.

18. Upon information and belief, Schutz's homeowners insurer, AIG Property Casualty Company ("AIG"), has paid $2,776,175.35 to compensate Schutz for the damaged property.

B. THE UNDERLYING ACTION

19. On March 14, 2016, AIG, as subrogee of Schutz, filed an action against Bayview, Navien, and certain other subcontractors that assisted in the construction of the Property, entitled AIG Property Cas. Co. a/s/o Schutz and Andreades v. Bayview Homes, LLC, et al., Docket No. OCN-L-703-16 (the "Underlying Action").

20. Thereafter, on October 24, 2016, AIG sought leave from the court to file an amended complaint to name Maloney as a defendant and to add another cause of action against Navien. The court granted this motion on November 18, 2016.

21. The amended complaint in the Underlying Action asserts twelve causes of action. Those claims include (1) negligence against Bayview; (2) breach of contract against Bayview; (3) breach of warranty against Bayview; (4) negligence against Tradewinds; (5) breach of contract against Tradewinds; (6) breach of warranty against Tradewinds; (7) negligence against Shoreline; (8) breach of warranty against Shoreline; (9) negligence against Maloney; (10) breach of warranty against Maloney; (11) negligence against Navien; and (12) strict products liability against Navien.

22. With respect to Maloney specifically, AIG maintains that Maloney failed to properly repair and troubleshoot issues with the water heaters at the Property and that it failed to abide by applicable codes and regulations in connection with the repair of the water heaters.

23. Massachusetts Bay is providing a defense to Maloney in the Underlying Action, subject to a full reservation of rights under the terms of its policies.

C. THE MASSACHUSETTS BAY POLICIES

24. Massachusetts Bay issued Businessowners Policies to Maloney for annual periods extending from September 27, 2014 through September 27, 2017, under policy numbers ODY-4468842-17, ODY-4468842-18, and ODY-4468842-21[1] (the "Policies").

25. Each of the Policies has limits of $1,000,000 per occurrence and $2,000,000 in the aggregate for purposes of business liability coverage.

26. The Insuring Agreement for the Liability Coverage afforded by the Policies states as follows:

> 1. Business Liability
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", or "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage", or "personal and advertising injury", to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.
>
> * * *
>
> b. This insurance applies:
>
> (1) To "bodily injury" and "property damage" only if:
>
> (a) The "bodily injury" or "property damage" is caused by an occurrence that takes place in the "coverage territory";
>
> (b) The "bodily injury" or "property damage" occurs during the policy period; and

27. The Policies include the following relevant definitions:

[1] The 2016-2017 policy was issued and cancelled effective 9/27/2016 twice under policy numbers ODY-4468842-19 and ODY-4468842-20. Policy number ODY-4468842-21 is the controlling policy for the 2016-2017 policy period.

9. "Impaired property" means any tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

   a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

   b. You have failed to fulfill the terms of a contract or agreement;

   if such property can be restored to use by:

   a. The repair, replacement, adjustment or removal of "your product" or "your work"; or

   b. Your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

* * *

   f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

* * *

14. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

17. "Products-completed operations hazard":

   a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

      (1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

* * *

18. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

* * *

22. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

* * *

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.

28. The Policies preclude coverage for the following:

j. Professional Services

"Bodily injury," "property damage," "personal and advertising injury" arising out of the rendering of or failure to render any professional services:

(1) By you; or
(2) On your behalf; or
(3) For whom the insured assumed liability for reason of a contract or agreement,

regardless of whether or not any such service, advice or instruction is ordinary to any insured's profession. This includes but is not limited to:

* * *

(b) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications.

(c) Supervisory, inspection or engineering services;

* * *

l. Damage to Your Product

"Property damage" to "your product" arising out of it or any part of it.

m. Damage to Your Work

"Property damage" to "your work" arising out of it or any part of it and including in the "products – completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

n. Damage to Impaired Property or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work," or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

29. The Policies also include an endorsement entitled "Fungi or Bacteria Exclusion," which preclude coverage for:

a. "Bodily injury", "property damage" or "advertising and personal injury" that would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in a good or product intended for consumption.

30. This endorsement adds the following definition to the Policies:

"Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

FIRST CAUSE OF ACTION
(Declaratory Judgment)

31. Massachusetts Bay repeats and incorporates by reference the allegations contained within Paragraph 1 through 30 above as if set forth herein.

32. The Policies afford coverage to "property damage" only to the extent that it is caused by an "occurrence."

33. The definition of "occurrence" in the Policies is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

34. The Underlying Action asserts claims against Maloney alleging faulty workmanship and breach of contract in connection with its services relating to the water heaters.

35. Based upon these allegations, Maloney is not entitled to coverage under the Policies to repair or replace its faulty work to the extent that such damages do not constitute an "occurrence."

36. In order to obtain coverage under the Policies, the Underlying Action must also allege "property damage," as defined by the Policies.

37. The Policies define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or…[l]oss of use of tangible property that is not physically injured."

38. The Underlying Action alleges damages arising from Maloney's purported faulty workmanship in relation to its role at the Property.

39. Based upon these allegations, Maloney is not entitled to coverage under the Policies for the claims relating to the repair or replacement of its faulty workmanship to the extent that such damages do not constitute "property damage."

40. In order to trigger coverage under the Policies, the alleged damage also must have taken place during the periods in which the particular Policies were in effect.

41. The Underlying Action states that the damage took place between January and April of 2015.

42. Insofar as the Underlying Action alleges damages that took place outside of the applicable policy periods, coverage for such damages is not available.

43. The Policies include a "Professional Services" exclusion that bars coverage for damages arising out of the "rendering of or failure to render any professional services..."

44. To the extent that the Underlying Action seeks damages from Maloney as a result of its rendering of or failure to render any professional services, coverage is barred under the Policies for such damages.

45. The Policies also contain a "Damage to Your Product" exclusion, which precludes coverage for "property damage" to the insured's product, arising out of it or any part of it.

46. Maloney provided services related to the water heaters at the Property, and the Underlying Action alleges that the water heaters did not function properly.

47. As a result, coverage for damages relating to the water heaters is precluded by the "Damage to Your Product" exclusion included within the Policies.

48. The Policies also include a "Damage to Your Work" exclusion, which bars coverage for "property damage" to the insured's work arising out of it or any part and is included in the "products-completed operations hazard."

49. Maloney provided services related to the water heaters at the Property, and the Underlying Action alleges that the water heaters did not function properly.

50. As a result, coverage for damages relating to the water heaters in the Underlying Action is precluded by the "Damage to Your Work" exclusion included in the Policies.

51. The Policies also incorporate a "Damage To Property Not Physically Impaired" exclusion, which bars coverage for "property damage" to "impaired property" or property that has not been physically injured, arising out of:

> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

52. Insofar as the Underlying Action seeks damage to property that cannot be used or is less useful as a result of the incorporation of Maloney's "work" or failure to perform under the terms of a contract, coverage for such damages is not available under the Policies.

53. The Policies include a "Fungi or Bacteria Exclusion," which bars coverage for damage that would not have occurred, in whole or in part, but for the actual or alleged existence of "fungi" or bacteria, as well as any costs relating to the abatement of such "fungi" or bacteria.

54. The Underlying Action asserts that the Property was demolished because of the presence of mold at the Property resulting from Maloney's work.

55. Because the Policies preclude coverage for damages relating to the existence of mold, coverage is not available to Maloney for the Underlying Action.

56. As a result of the foregoing, an actual and justiciable controversy exists between Massachusetts Bay and Maloney regarding Massachusetts Bay's obligations under the Policies with respect to coverage for the Underlying Action. Accordingly, Massachusetts Bay is entitled to a declaration that it owes no coverage to Maloney for the Underlying Action.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant as follows:

a) For a declaration that the Policies do not provide coverage for the claims tendered in connection with the Underlying Action;

b) For a declaration that Massachusetts Bay is not obligated to defend or indemnify Maloney with respect to the Underlying Action;

c) For reimbursement of costs incurred by Massachusetts Bay that are not covered by the Policies; and

d) For such other relief as this Court deems just and equitable.

CARROLL, McNULTY & KULL LLC

_/s/ Christopher R. Carroll_______________

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